Supreme Court, U.S.
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No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 12, 1999
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FLOYD J. CARTER V. UNITED STATES
NO. 99-5716

RELEVANT DOCKET ENTRIES*
Criminal No. 97-520 (D.N.J.)

Date	Proceedings
9/12/97	Indictment filed.
9/18/97	Defendant's arraignment and plea of not guilty.
1/21/98	Trial before the Honorable Mary Little Parell, United States District Judge for the District of New Jersey and a jury.
1/22/98	Trial before the Honorable Mary Little Parell, United States District Judge for the District of New Jersey and a jury.
1/23/98	Trial before the Honorable Mary Little Parell, United States District Judge for the District of New Jersey and a jury. Testimony concludes.
1/23/98	Jury verdict of guilty.
10/15/98	Sentencing of Defendant.
10/21/98	Defendant's Notice of Appeal filed.
10/28/98	Judgment in a Criminal Case entered.
12/8/98	Amended Judgment in a Criminal Case entered.

*Text of entries edited for clarity.

970 /hek

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Crim. No. 97-520 (MLP)
	:	18 U.S.C. §§ 2113(a) & 2
v.	:	
	:	
FLOYD J. CARTER	:	
and	:	
TERRY A. STILWELL	:	

INDICTMENT

(Filed Sep. 12, 1997)

The Grand Jury, in and for the District of New Jersey, sitting in Newark, charges:

On or about September 9, 1997, at Hamilton Township, in Mercer County, in the District of New Jersey, and elsewhere, the defendants,

FLOYD J. CARTER
and
TERRY A. STILWELL

did knowingly and willfully, by force and violence and by intimidation, take from the person and presence of a teller approximately $14,000 belonging to and in the care, custody, control, management, and possession of the Collective Savings Bank, 3144 South Broad Street, Hamilton Township, New Jersey, whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Sections 2113(a) and 2.

A TRUE BILL

/s/ Illegible
FOREPERSON

/s/ Faith S. Hochberg
FAITH S. HOCHBERG
United States Attorney

FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW JERSEY

RICHARD COUGHLIN FEDERAL PUBLIC DEFENDER
TONIANNE J. BONGIOVANNI FIRST ASSISTANT

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Station Plaza 4, 4th Floor
Trenton, NJ 08609
(609) 898-2160 Telephone
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January 20, 1998

Honorable Mary Little Parell
United States District Judge
Clarkson S. Fisher Federal Building
and United States Courthouse
402 East State Street
Trenton, New Jersey 08608

RE: *United States v. Floyd Carter*
Criminal No. 97-520

Dear Judge Parell:

Please accept this letter in support of a more formal memorandum setting forth the law requiring the submission of the charge of bank larceny to the jury in this case. The proposed charge is attached as Exhibit 1.

① Lesser Included Offense

Bank Larceny, 18 U.S.C. §2213(b) is a lesser include [sic] offense of Bank Robbery, 18 U.S.C. §2213(b). Both provisions come under the title "Bank Robbery and Incidental Crimes." An "elements" test was established in *Schmuck v. United States*, for determining whether an offense is "necessarily included in the offense charged,

489 U.S. 705 (1989). Under the "elements" test, a lesser offense cannot contain an element not required for the greater offense. The elements of the lesser offense must be a "subset" of the offense charged. Id. At 714. Comparison is appropriately conducted be [sic] reference to the statutory elements of the offense in question. Id. At 718. The comparison must be textual. Id. at 720.

Undoubtedly the government will rely on *United States v. Mosley* (No. 96-5832 decided September 18, 1997, Third Circuit), to argue that bank larceny is not a lesser included offense of bank robbery (Exhibit 2). However, *Mosley* is in direct conflict with the holdings of the Court of Appeals in the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. (Cases listed Mosely Pg 10-11). A petition for a writ of certiorari challenging the propriety of *Mosley* is pending. *Mosley* also is factually distinguishable from the present case.

In *Mosley* the first charged bank robbery, Mosley told the teller "This is a hold-up" and demanded all big bills. Mosley gestured to his coat as if he had a weapon. The teller wet her pants while responding to Mosley's demand to "hurry". In the second charged bank robbery Mosley handed over a note to the teller which said in bold print "HOLD UP". He threw the "bait money" back at the teller and demanded more. In the present case no threats, gestures, demands or force are present.

In the Mosley analysis, the Circuit stated that the definition of bank robbery does not include the element of an "intent to steal or purloin" as the bank larceny statute states (*Mosley* Pg. 7). However, "textually", the bank robbery statute contains the dictionary definition of

"steal or purloin". That is, 18 U.S.C. §2113(a) contains the element "takes or attempt [sic] to take – from the person . . . " and the word "steal" is commonly defined "to take the property of another". See *Webster's New Collegiate Dictionary*, G&C Merrian Co. (1974) pg. 1138. The word "purloin" is a synonym of "steal". Id at 937. Therefore, the terms employed in the text of the bank robbery statute and bank larceny statute are alternative means of defining the same element.

Ultimately, because the element "steal or purloin" contained in the bank larceny statute, 18 U.S.C. §2113(b), is by definition contained in the bank robbery statute, 18 U.S.C. §2113(a), (. . . take or attempt to take from the person . . .) it is indeed a textual subset and therefore a lesser included offense within the -"elements" test adopted in *Schmuck v. Unites States*.

❷ Theory of the Case

Every criminal defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense based upon the evidence presented at trial, fairly submitted to the jury. *Keeble v. United States*, 412 U.S. 205, 208 (1995); *United States v. Burke*, 700 F.2d 70, 81 (2nd Cir. 1983). See also *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). (A trial court is "bound to give the substance of a requested instruction relating to any defense theory for which there [is] *any* foundation in the evidence) (emphasis supplied). This is so even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. *United States v. Sielaff*, 655 F.2d 402, 403 (7th

Cir. 1979). See also *United States v. Escobar de Bright*, 742 F.2d 1196 (9th Cir. 1984).

Failure to give a requested theory of defense instruction is reversible error when the requested instruction is: 1) correct; 2) was not substantially covered by the court's charge to the jury; and 3) deals with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense. *United States v. Benz*, 740 F.2d 903, 910 (11th Cir. 1984).

The evidence in this case, essentially indicating a theft or larceny from the bank warrants the larceny charge. It is a [sic] issue of importance in the defense. Fundamental fairness and the 6th Amendment right to a fair trial compel the instruction.

Respectfully submitted,

/s/ Brian P. Reilly
Brian P. Reilly
Assistant Federal Public Defender

BPR:mp

EXHIBIT 1 to LETTER-BRIEF

BANK LARCENY

Mr. Carter's defense in this case is that his conduct constituted the crime of Bank Larceny in violation of 18

U.S.C. §2113(b) rather than Bank robbery in violation of U.S.C. §2113(a).[1]

I have already charged you as to the four essential elements that the government must prove beyond a reasonable doubt to establish the crime of Bank Robbery. To establish the crime of Bank Larceny, there are also four essential elements that must be proved beyond a reasonable doubt.

The elements of Bank Larceny are:

for Count 1:

First: That the defendant took money that was in the case [sic], possession, control and custody of the Collective Federal Savings Bank, Hamilton, New Jersey; and

Second: That the defendant took the money for his own use and benefit knowing that it did not belong to him; and

Third: The money was worth more than $100; and

Fourth: The Collective Federal Savings Bank, Hamilton, New Jersey, is insured by

---

[1] Every criminal defendant is entitled to have his theory of the case, if ti [sic] could amount to legally sufficient defense based upon the evidence presented at trial, fairly submitted to the jury." *United States v. Burke*, 700 F.2d 70, 81 (2nd Cir. 1983); See also *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). (A trial court is "bound to give the substance of a requested instruction relating to any defense theory for which there [is] any foundation in the evidence")

the Federal Deposit Insurance Corporation, a member of the Federal Reserve System.

If you find that the government proved each of these elements beyond a reasonable doubt, then you must find the defendant guilty of Bank Larceny as to Count One.[2]

Respectfully submitted,

Brian P. Reilly
Assistant Federal Public Defender

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[2] Potuto, Saltzburt [sic] & Perlman, *Federal Criminal Jury Instructions*, Second Edition (1993 Supplement).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	No.: CR-97-520 (MLP)
v.	Trenton, New Jersey
FLOYD J. CARTER,	January 20, 1998
Defendant.	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE MARY LITTLE PARELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	U.S. Attorney's Office BY: HENRY KLINGEMAN, ESQUIRE 970 Broad Street Newark, NJ 07102
For the Defendant:	Federal Public Defender's Office By: BRIAN P. REILLY, ESQUIRE 22 S. Clinton Avenue Trenton, NJ 08608
E.S.R. Operator:	Michael Rivera
Transcription Company:	L.B.S., Inc. (80047US.1) P.O. Box 182 Riverton, New Jersey 08077 1-800-678-9558

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

* * *

[26] he does understand.

THE COURT: All right. Well, let's take a moment out of the presence of the jury if that time does arrive. Thank you. Now we'll take up the defense's motions. Mr. Reilly, I have received proposed jury instructions from you. I'm looking them over. Some of them appear to be quite similar to what we generally include in our standard jury instructions, and I'll give you a follow-up on that tomorrow as I will for your proposed instructions, Mr. Klingeman. Now this motion, Mr. Reilly, concerning whether the lesser included offense of bank larceny should be charged to the jury along with the offense of bank robbery, which is in the indictment. I have your letter brief on that and I am familiar with the *Mosely* case and I have reviewed it again since you attached it as a courtesy to your moving papers. Do you wish to argue the motion now?

MR. REILLY: Judge, can we – can we put the evidence in and then will you hear me?

THE COURT: That's fine, if you wish to do it that way. You can't open to the jury with this unless you –

MR. REILLY: I – Your Honor –

THE COURT: You can say –

MR. REILLY: I'm not going to tell the jury to convict him of bank larceny. I am going to tell them that this is not [27] a bank robbery.

THE COURT: You can tell them the government is not going to be able to prove each element of what they

must prove in order to establish the offense of the indictment.

MR. REILLY: And I can tell them that he stole money. That's what this crime is. I mean, I just don't want to get in any trouble with you, Judge. I don't want to step over the line. I will not say –

THE COURT: What is your defense? That he didn't use force, violence or intimidation?

MR. REILLY: That's correct, Judge. And again, if you look in the narrow sense, my defense is the government can't prove the elements of the offense. But the broad defense is they can't prove the elements of the offense, therefore, this is a larceny.

THE COURT: Well, just so long as you don't argue the law to the jury in your opening, I think that there's no error there.

MR. REILLY: And Judge, if after the evidence goes in, you can review my brief or we can discuss it at that time and make the final decision on whether that. I'm certainly not going to stand up and say the Judge is going to tell you that bank larceny is also a part of this case. I would never do that, Judge. But if you hold off on making that decision until after the evidence is, I think it would be appropriate.

[28] THE COURT: Mr. Klingeman?

MR. KLINGEMAN: I'm also familiar with the *Mosely* case. I tried that case, so I know this issue and Mosely did not turn on the facts in the case. It's a legal judgment as to whether bank larceny is a lesser included offense of bank robbery, and the Third Circuit decided

definitively that it is not and thus, under no set of factual circumstances was Mr. Mosely entitled to the instruction and no bank robbery defendant would be entitled to that instruction under the law –

THE COURT: In the Third Circuit.

MR. KLINGEMAN: – in the Third Circuit. And therefore, whether the issue is decided now or after evidence is taken, the decision ought to be the same and that's to deny the instruction.

I do acknowledge and intend to meet the challenge that we must prove the element of the use of force, violence and intimidation, and I suppose the argument to the jury is going to have to be either bank robbery or nothing, and that the issue would be joined, and that's the way it should be.

MR. REILLY: Your Honor, I backed up the argument for a lesser included with a charge to the jury on my theory of the case based on the Sixth Amendment right to a fair trial. If specifically, the charge – if the jury is specifically not going to be given the option to decide on bank larceny, I would ask, Your Honor, as a backup that as a backup on my argument [29] that they should be – have information about it as my theory of the case, that they, at that time, be aware of what the law of larceny is and I think that may be a decision that should wait until after trial.

But I think, Your Honor, after – I have also, as best I could at this point with Your Honor not hearing the evidence, distinguished *Mosely* from this case and I think that you may see, you know, a different, you know, horse

race in front of you and with the disjointed rulings throughout the circuits, I think Your Honor can consider it.

THE COURT: Mr. Reilly, I will state at the outset that I don't see any likelihood that your argument will be able to overcome the very strong holding of the Third Circuit, which is binding upon the courts here, and they went out of their way in that decision to say our decision does not turn on the facts at all.

It's a legal decision and we simply, by analyzing the text of these two statutes, the bank robbery and the bank larceny statute, we decline to follow the majority of the circuits in finding the latter to the lesser included offense and we so hold.

I don't know how any possible rendering of the facts at this trial would change that very clear legal ruling by the Third Circuit. So that's a preview of what I think I'm going to be required to rule, but I certainly will hold off making [30] that ultimate ruling until the appropriate time.

I also note that the Sixth Amendment argument was included in the *Mosley* case and was not found to control the decision, that argument having been that the defendant is entitled to instructions on their theory of the defense. They said that was not enough if bank larceny is not a lesser included offense.

So you have an uphill battle here, it seems to me, on the current state of the law in this circuit, which I am sure you recognize. As far as educating the jury on matters not

charged, I would have to be persuaded that that can be done and I don't think that it can be.

Basically, the government it seems to me has framed its case by charging bank robbery, and they either rise or fall on the strength of their proofs on the offense charged. That's how I see it, at least going in.

Is there anything further?

MR. REILLY: Judge, if I may, there's just a matter of the 204B issues which Mr. Klingeman had touched on. There were four or five – four or five incidents that were listed in the motions that we previously heard. Mr. Klingeman has indicated to me that they will not be using any 404B in this case.

However, I just want to place something on the record with my concern with that. Agent Maxwell, who is the case agent and will probably testify, and Terry Stillwell, who is

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	Case No.: CR97-520 (MLP)
v.	Trenton, New Jersey
FLOYD J. CARTER,	January 22, 1998
Defendant.	10:00 a.m.

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE MARY LITTLE PARELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: United States District Attorney
BY: HENRY E. KLINGEMAN, ESQUIRE
970 Broad Street
Newark, New Jersey 07102

For the Defendant:
Federal Public Defender
BY: BRIAN P. REILLY, ESQUIRE
22 South Clinton Avenue
Trenton, New Jersey 08609

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[2] (Court Convened 10:00 a.m.)

THE COURT: Are there any issues to raise as we start this morning?

MR. REILLY: I'm not sure, not preliminarily, Judge.

THE COURT: All right. How about Mr. Klingeman?

MR. KLINGEMAN: No, Your Honor.

THE COURT: I would like to have a preview at this time, Mr. Klingeman, as to whether you're going to call any more witnesses because if we bring out the jury and you rest, I'll be entertaining motions right away and it would be kind of a shuffle for the jury to come out, you rest and then have to send them back.

MR. KLINGEMAN: Your Honor, I do intend – I do intend to rest.

THE COURT: Okay. Then, Mr. Reilly, I'm sure you're prepared to argue your motion.

MR. REILLY: Yes, Your Honor, and I'll not be calling witnesses.

THE COURT: Would counsel be willing to make your arguments now on the Rule 29 motion and allow me to rule on it provisionally in anticipation of Mr. Klingeman resting?

MR. REILLY: That's fine, Your Honor.

THE COURT: I think that that's clearer for the jury. Then, depending on my ruling if the case goes forward, then we'll bring out the jury and we'll go forward with whatever you [3] want to do.

MR. REILLY: That's fine, Judge.

THE COURT: All right. So, Mr. Reilly, make your motion.

MR. REILLY: Your Honor, this is a motion for Judgment of Acquittal pursuant to Rule 29. Understanding the standards that are in effect, that the evidence is viewed in a light most favorable to the Government.

Again, Judge, as is clear in this case, the crux of the issue is whether force, violence or intimidation were used or occurred in this case. And I submit that the evidence does not show, and the Government has not met it's burden, and the jury – there is not enough evidence in this case for a reasonable juror to even infer that force, violence or intimidation occurred.

The focus, of course, Judge, according to the law and according to the jury instruction that you prepared that states the law, is that it is Mr. Carter's conduct that is at issue here. It is not the subjective feelings of the witnesses that we heard so much of during this case.

The fact is, Judge, his conduct being the issue, we have to look at all the conduct. We have first Mr. – the evidence showing that Mr. Carter entered the bank, screams no threats. He's unarmed. He permits customers to leave. He doesn't round anybody up. A decision made peaceable and [4] non-threatening.

Of course, he bumps into Mrs. Zahn, but she's free to leave and she knows that he has no interest in her. He makes no demands on her. He doesn't insist that she stay in the bank, and in fact, she's free to go. And it's clear in this case that Mr. Carter just wants to get the money and get out. And in fact, through Agent Maxwell, he admitted as much by simply saying the specific words, "I wanted to snatch a money bag". I went in and I took the money and that's what I did.

When he goes to the counter, Judge, I know that, you know, there's been some discrepancies about the charts. But what is clear from all that is that Mrs. Chudney's – Ms. Kudney's office comes out to a certain level, and the teller station that he crossed is certainly further over to the right than the Government's chart indicates.

Now in going into the bank, he had the opportunity to go, I mean, you want to accomplish this offense quickly – to go straight ahead, to either Senteck (sic) or Kalikal (sic). But there's people there, all right? And he specifically made the decision to go away from where the people are. And I think that's an indication that's completely contrary to any force, violence or intimidation.

He specifically takes the time to say to the tellers, don't worry, I'm not going to hurt you. Okay. Now what kind of conduct is that? That's conduct clearly indicating no [5] threats, no force, no violence, no intimidation. And I think that, Judge, it's completely contrary to the concept of the elements of force, violence or intimidation.

Once he grabs the money, he runs out and he simply says, don't follow. Okay. Now I think based on all those facts, Judge, based on what his conduct is and what was

presented here in this Court, no reasonable fact finder could find threat, force or intimidation. And I ask that Your Honor enter a Judgment of Acquittal.

THE COURT: Thank you, Mr. Reilly. What is the Government's response?

MR. KLINGEMAN: Your Honor, the United States opposes the motion. There are four elements to the offense charged in the indictment and the United States has provided evidence that when viewed in a light a most favorable to the Government establishes that the defendant committed the offense charged.

The first element is that the defendant knowingly and willfully took money from or in the presence of employees of the Collective Savings Bank, Hamilton Township, New Jersey. Through the testimony of Ms. Kalikal, Ms. Kudney and Mr. Phipps, who conducted an audit, it's clear that the defendant did take money. And based on the posture that the defense has taken in this case, that fact is undisputed.

The second element is that the money was in the care, custody, control, management or possession of the Collective [6] Savings Bank at the time it was. taken. The testimony elicited establishes that not only was the money taken from teller drawers where it had been secured, but that the audit conducted by Mr. Phipps revealed that the money was, in fact, the bank's money and not the personal property of any of the employees.

Third, the defendant took the money by means of force, violence or intimidation. Let me set that aside for a moment.

And fourth, at the time the money was taken from the Collective Savings Bank, the deposits of the bank were insured by the Federal Deposit Insurance Corporation. We elicited testimony from Mr. Phipps and included as Government Exhibit 111 which has been admitted, the FDIC certificate indicating that at the time of the bank robbery, the bank was so insured.

With respect to the first, second and fourth elements, there's apparently no dispute.

In any event, getting back to the third element, whether the defendant took the money by means of force, violence or intimidation, the use of force and violence is defined as including the use of physical strength or physical violence. Obviously, Mr. Carter's physical conduct when he was in the bank manifested both of those prongs of the definition.

He shoved Ms. Zahn out of the way. There's no question that that was not an accident. In fact, there's no evidence that it was an accident other than Mr. Reilly's [7] representation in opening statement.

He leaped over the counter, not once, but twice. And I think under the circumstances, his use of that technique to reach the tellers' areas is itself a manifestation of physical strength equaling force. And with respect to intimidation, the panoply of actions in which he engaged amount to intimidation.

First of all, the use of the ski mask which has been admitted as Government Exhibit 112, ought to be enough in and of itself to establish this element. Any reasonable person associates a ski mask being worn in a location

other than a ski slope as a mask of terror. And that is the purpose for which is was used in this case. Secondarily, of course, the defendant may have been attempting to disguise his identity, but certainly the use of the ski mask, whether he had the specific intent or not, amounts to an intimidation technique.

You add to that the statement he made to Mrs. Zahn, hold on, move over, as he shoved her aside; the way he jumped over the counter and took the money from the presence of the tellers; the way be jumped back over and fled; the fact that he said to the tellers and the other people assembled in the bank, "don't follow me", which is clearly a threat. It's not – he was not playing a game. He was not suggesting that he was playing hide and seek and he didn't anybody to see where he was going to go hide. It was clearly an implied threat that if anyone followed him, consequences would follow. [8] Not only do we survive or meet the Rule 29 standard, but this evidence will establish his guilt beyond a reasonable doubt and so, therefore, I would respectfully request that the motion be denied and we submit this case to the jury.

THE COURT: Mr. Reilly, do you have anything in response?

MR. REILLY: Your Honor, I just want to make one comment, and indicating in response to the Government's argument that the mask in itself is intimidation. The law is that intimidation involves conduct that is reasonably calculated to instill fear of bodily harm. I don't think that that intimidation occurred in this case, and there's no evidence in this case that that intimidation

occurred. And I submit that the motion should be granted.

THE COURT: There's no dispute about the standard for the Court's evaluating a Rule 29 motion is that the evidence must be viewed in a light most favorable to the Government who is the non-moving party. And that the question is whether a reasonable jury could find in favor of the Government on the charge presented beyond a reasonable doubt.

The arguments of counsel have accurately reviewed what are basically uncontroverted facts. But I will review the evidence as well.

There is ample evidence in this even brief trial establ charge. It has been established by the evidence that the [9] defendant knowingly and willfully took money from or in the presence of employees of the Collective Savings Bank on the date in question. That's the first element.

The second element, likewise, has been satisfied. It has been established through the testimony of the bank manager, Mr. Phipps, as well as the corroborating testimony of an officer of Hamilton Township that the money that Mr. Carter was found with was, in fact, the money which had been taken from the management and possession of the bank. There was bait money involved and the serial numbers of the bait money were maintained by the bank and found on at least 50 of the – exactly 50 of the bills that were in Mr. Carter's possession when he was apprehended directly after the incident at the bank.

And, of course, through the bank manager, the Government has established that the bank and its deposits were insured by the FDIC at the time of the incident.

And so, the issue here will boil down to whether the evidence presented, a reasonable jury could find beyond a reasonable doubt that Mr. Carter took this money by means of force, violence or intimidation. And here again, the facts are relatively – the essential facts are uncontroverted but they have been established through the evidence.

The first witness was Maria Zähn, who was a customer at the time of the incident. She testified that on the date in [10] question which was September 9, 1997, it was a nice day. The weather was fairly warm. She had completed her business at the teller window at approximately 2:00 and was exiting the bank in order to pick up her children from school.

As she approached the exit door of the bank, she was confronted face-to-face by a person entering that door from the right who was wearing a knitted ski mask and heavy winter clothing. He opened the door and she immediately wanted to run out. He grabbed her physically with both hands and pushed her inside, saying, hold on. In other words, restraining her exit from the bank and then moved her or turned her in such a way as to spin her out of his way as he rapidly entered the bank. And with that, he said move over.

She also testified here that she screamed upon having that encounter. He rapidly moved on past her. She watched him as he moved in the direction of the tellers. After that her part in this scenario was over.

The next witness to testify was a customer service rep named Marjorie Kudney, and she was sitting at a customer service desk directly inside the door in question and she had a cubicle of sorts which gave her complete vision of the lobby area of the bank and the teller windows. And so she was an observer of these events rather than a direct participant.

She said that she first noticed anything irregular when she heard a scream. She looked up and saw a lady, a [11] customer exiting through that door and then she immediately looked to her right and saw a man jumping over the counter into the teller stations. She described the man, also, as wearing a mask and dark clothes. Then she said that this man walked behind the teller area and appeared to be taking money from the teller stations. She was also seated at her desk throughout this brief episode. And as the man left, she said that she heard the man say, don't follow me. And she indicated that she was feeling nervous and a little frightened having witnessed this.

The cross examination brought out that she had – Ms. Kudney had indicated to the police that at no time was she in fear for her life and that she saw no weapon and heard no threats except the last statement which was not to follow him. She heard no demands being made by him. She did interpret the last statement as sort of a threat and also she stated on re-redirect that although she was not in fear of her life, she was in fear at that sequence of events.

The next witness to testify was Mildred Kalikal; she was one of the tellers. She was there at the teller station at approximately 2:00, assisting a male customer, and all of a sudden she saw the man described jumping over the

counter at Ms. Hairsten's station which was two down from her. She testified that Ms. Senteck's station was the one immediately to her left and that after the man had jumped over at Ms. [12] Hairsten's station, Ms. Hairsten had run from her teller station to the branch manager's office and that the man had gone to Senteck's station, opening the drawers of Senteck's teller equipment station and – both top and bottom drawers, he opened – and he took the money out of those drawers and put it in a brown grocery bag.

Ms. Kalikal testified that while this was occurring at Ms. Senteck's station, Ms. Senteck was at her station crying and trembling. Ms. Kalikal also said that as this was transpiring, the man in the mask said to all of them – at this point it would be two of them – that he wouldn't hurt anybody.

Ms. Kalikal also testified, over the objection of defendant, that as she witnessed this sequence of events and as he then came to her drawer, standing about two feet from her, she felt scared. She was afraid that there might be a weapon. And although the man said that he wouldn't hurt anyone, she was still afraid. She had never encountered anything like that in all her life. She was really scared; did not know what to do and she stood motionless while the man proceeded to open her top drawer, moving quickly, and removing money from that drawer and putting it in his bag.

She also witnessed him leaving saying that no one should follow; and she perceived this as a threat, such that if anyone did follow, he might hurt them.

She did confirm that she was not verbally threatened [13] and that no demands were made to her.

The branch manager Mr. Phipps testified he had his own office, which gave him full view of the lobby because he had an interior glass window and his door was opened at the time. He was sitting at his desk when he heard a loud bang, and then a blur, via monitor, running across the lobby, which he perceived as a man. As the man reached Ms. Hairsten's station, he saw the man leap into Ms. Hairsten's station by jumping in one leap – he hurtled the counter in one leap.

Mr. Phipps was not quite sure how this man negotiated the ropes and stanchions, which indicated the line for the customers, but he did confirm that the man ran toward the teller counter and that he jumped over at the location of Ms. Hairsten's counter, whereupon Ms. Hairsten ran into Mr. Phipps, office saying he's after me, and also saying my purse is still there.

At that point Mr. Phipps replied to her that in Mr. Phipps' observation the man was not after Ms. Hairsten, he was after the bank's money and not after her purse. He was after the banks' money.

At that point Mr. Phipps pressed the alarm while he witnessed the man going to the several teller drawers, taking the money and then exiting by leaping over the same counter from which he had entered and going out of the bank.

He said he was upset and scared while all this [14] occurred and that when the man left he described that the tellers were frozen and that while he had taken the

money, according to his testimony, he perceived that those particular tellers were scared to death and that they stood there without looking at the man.

He confirmed also that no weapons were used in this incident and that he heard no demands while the man was taking the money. He also confirmed – I'm not sure whether he corroborated the testimony of the others, which is undisputed – that as the man left he said don't follow.

Mr. Phipps provided additional testimony to the effect of what he did in order the manage the bank once the man left. Namely, he had the interior lock thrown so that everyone within the bank was secure and then he started the investigational procedures, including with the customer who had been standing at Ms. Kalikal's station at the time.

The testimony of Officer Inman (sic) had to do with the apprehension and putting in the various physical items of evidence so they do not go to the events within the bank, except that they do confirm what the defendant was wearing; namely, that when he was apprehended he had in his possession a black ski mask and that he was wearing not only heavy clothing, but several layers of clothing, including at least two layers of pants as possible outer-wear.

Special Agent, F.B.I. Agent James Maxwell testified [15] that he interviewed the defendant immediately after the arrest and after providing him with his rights and having him also read a waiver statement, which was signed and witnessed at 3:05 p.m., less than an hour after the incident.

Among other things, as reported by Agent Maxwell, the defendant did admit taking the money; he did admit entering the bank for that purpose, but said that he went to the bank to snatch the money and that he went into the bank so that he could take the money.

I have reviewed again the *Mosley* case, this time from the standpoint of what sorts of facts could support a conviction on what is called bank robbery, which is found at 18 *U.S.C.* Section 2113(a). The indictment in this case does charge that offense.

It does not charge the offense set forth at 18 *U.S.C.* Section 2113(b), which is known as bank larceny, and earlier we were discussing defendant's motion that this case should be regarded as, at least, potentially including the bank larceny charge as a lesser included offense. We will get to that again, of course, as we deal with the jury charge, but the *Mosley* case does set forth the facts of the two robberies which were involved in *Mosley* which resulted in convictions on the bank robbery charge. It also discussed the difference between bank robbery and bank larceny as envisioned by Congress in passing these in two separate provisions.

[16] In the *Mosley* incident there was a confrontation of tellers at the a First Fidelity Bank on November 20, 1995; and a different First Fidelity Bank on November 9, 1995, which were charged in that case.

In the first count offense the individual had approached the teller window, leaned toward her and said this is a hold up and instructed her to open the drawer and give him the money and the teller did so,

while he was telling her to hurry, hurry, and get the big bills first.

At that case there was a gesturing by the defendant as if he had something there, but there was no weapon actually used or brandished or mentioned.

In the second incident the same man entered the different bank on a different date with a sign reading "hold up" and approached the teller station. The teller testified that Mosley placed both of his hands on the counter and said can I have all your money, with the perpetrator using a defensive, but demanding, tone of voice. She gave him first bait money, which he threw back at her and then she gave him the other money and the defendant walked out at a fast pace and the teller walked away at that point, in that circumstance.

So those were confrontations. They did involve demands, which this case did not. They did not involve weapons, and neither did this case.

In the discussion of the Third Circuit Court of [17] Appeals in the *Mosley* decision in which they did find, of course, that as a matter of law in this Circuit it is their view that the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense; and, of course, the *Mosley* case did recognize that in reaching that conclusion they find themselves in the minority of circuits, at least at this time.

They explained by reference to earlier cases, both in another circuit and in our United States Supreme Court,

the legislative history of the bank larceny statute, Section 2113(b); and in brief reference, I am reviewing it because I think it sheds some light on what is the distinction between bank larceny and bank robbery.

They said that Congress initially passed the bank robbery legislation, now found as Section 2113(a), in 1934 and declined at that time to pass a bank larceny provision which had been proposed. They added the larceny provision three years later, according to the *Mosley* decision, in reaction to a case in which a man walked into a bank and without confronting any bank employees helped himself to $11,000.

Thus, said *Mosley*, the larceny statute seems designed to address a different factual scenario than the typical bank robbery case.

I have followed up by looking at the Supreme Court [18] case which sets forth this history of the bank larceny statute, and that is found in *Bell v. United States*, 462, U.S. 356. The *Mosley* case particularly refers to Section 365, Note 4 of that decision, which is found in Justice Steven's opinion dissenting; however, the history of the statute is found in that dissenting opinion and the facts in the case referred to – I will read that footnote, which is a quote from the *Congressional Record* (1937). The *Congressional Record* says;

> " The fact that the statute [as of 1937 that was] is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago when a man was arrested in a national bank while walking out of the building with $11,000

of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees without displaying any force or violence and without putting anyone in fear, which are necessary elements of the crime of robbery, and was about the leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute . . . "

So it is conceivable, it seems to me, that a person could commit bank larceny while walking into a bank and not have that taking rise to the level of bank robbery, even if it [19] is not a taking by trickery such as cheating a bank teller out of money by presenting a bad check or something.

However, the facts of this case are far removed from a peaceable and stealthy theft of money from this bank and I think that a reasonable jury could indeed find beyond a reasonable doubt, based upon the evidence which has been presented in this case that, objectively speaking, the behavior of Mr. Carter was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank robbery offense.

For those reasons, and with due regard to the able and I think very effective presentation by counsel for the defendant, I deny the motion which has been brought under Rule 29.

At this point we do anticipate that the Government will rest and, Mr. Reilly, you have your opportunity to present any case that you wish on behalf of your defendant after that.

MR. REILLY: Okay. Judge, did you want to do the jury charges now or will we do it –

THE COURT: Well that's what I'm thinking. Again, because we'll bring the jury out and if both sides are going to rest then they will leave.

MR. REILLY: If I could just have a minute on that last issue, Judge.

[20] THE COURT: Certainly. You can have all the time you want.

MR. REILLY: A very brief minute. (Pause)

MR. REILLY: Your Honor, Mr. Carter will be taking the stand and I just want to clarify one issue, and we did this pretrial and I just want to make sure everybody is on the same page.

Mr. Klingeman has agreed that the only prior conviction for cross examination is a January 7, 1990 – I'm sorry, May 10, 1996 conviction for theft by unlawful taking out of Mercer County Superior Court.

Again, if the door is open, I guess that's another problem because there are some other convictions; however, what I want to avoid, Judge, is any circumstance – and I have no reason to believe that Mr. Klingeman will do it, but I just want to make sure that if there is any question – or that there should not be any questioning as to the issue of what happened, you know, for an explanation of what happened, the circumstances surrounding that conviction, necessitating an objection on my part in front of the jury and I would just like to avoid that.

THE COURT: Mr. Klingeman, can you indicate your intention with respect to the use of the prior conviction?

MR. KLINGEMAN: I don't intend to get into the

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[Caption Omitted In Printing]

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[71] defense will insert.

MR. REILLY: If you want to write it in now.

THE COURT: Okay. Do it over there and then give it to Kelly and we'll make copies. And as soon as you're ready, let's do this conference then before we recess for lunch.

MR. REILLY: Judge –

THE COURT: Do you want five minutes?

MR. REILLY: Since this goes in, can I – should I have somebody from – I mean I'm happy to do it – somebody from my office pick this up and type it up real quick?

THE COURT: No, we can do that.

MR. KLINGEMAN: That's fine.

THE COURT: Uh-huh. All right, well we will –

MR. REILLY: Oh, Kelly, I'm sorry.

THE COURT: – we won't even type this. We'll just xerox it now. We'll do the conference and then I will make any changes that are agreed to by the Court and provide you with a final draft of the charge. You can take that along with you. It won't take us but a few minutes to rerun it.

MR. REILLY: Thanks, Your Honor.

THE COURT: So if you'll just stand by, we'll have the conference on the record here in open Court.

(Off the record)

THE COURT: Okay. We'll conduct the jury charge conference at this time.

[72] MR. KLINGEMAN: Yes.

THE COURT: Mr. Reilly, you're on your feet. You may go.

MR. REILLY: Your Honor, I had submitted and I asked Your Honor to charge the theory of the case, a theory of the case charge to the jury in light of the fact – and I don't think your opinion has changed – that I'm not going to get a lesser included charge for the jury to consider. Therefore, I would request that the theory of the case which is just a one paragraph document that the government has reviewed and, in fact, the government has made an addition to that I don't object to, I ask that that be charged.

Other than that, Judge, the only thing that I have, the only comment that I have on your charge in draft one is on page 13, the second to last paragraph from the bottom. The paragraph begins, a person acts willfully. I would request, Your Honor, that an additional sentence be added to that indicating that conduct is not willful if it was done due to negligence, inadvertence or mistake.

THE COURT: Mr. Klingeman.

MR. KLINGEMAN: I have no problem with that.

THE COURT: Okay. I'm not familiar with that sentence being there, but if there's no objection, I think

that that is certainly an accurate statement of the concept. Read it to me again.

[73] MR. REILLY: One second, Your Honor. The paragraph – read the sentence?

THE COURT: I know where it is. I know where it is. Conduct is not willful –

MR. REILLY: Is not willful if it was done due to negligence, inadvertence or mistake.

THE COURT: Okay.

MR. REILLY: That's my only comment with respect to the charge, Your Honor.

MR. KLINGEMAN: Your Honor, beginning on page 10, the first headlined instruction, Impeachment by Prior Conviction is applicable.

THE COURT: Right. And I'll take out the heading and just leave in the text.

MR. KLINGEMAN: Okay. The second headlined instruction on that page, Cooperating Witness, is inapplicable.

THE COURT: Right.

MR. KLINGEMAN: On page 11, the first highlighted instruction, Defendant's Testimony, is applicable and the second one is inapplicable.

THE COURT: All right.

MR. KLINGEMAN: On page 14 –

THE COURT: And I'll take out the heading.

MR. KLINGEMAN: On page 14, the last full paragraph, and on page 15, the first full paragraph, are both inapplicable [74] to this case, and I'd ask that they be deleted as well.

THE COURT: The thing about good motive is not a defense?

MR. KLINGEMAN: Well the first paragraph actually begins, personal advancement and financial gain are two well recognized motives.

THE COURT: Right.

MR. KLINGEMAN: And the second paragraph begins, good motive alone. Obviously, in light of the evidence, neither of them apply.

THE COURT: I would suggest if we're going to agree to delete that, that we should leave out the prior paragraph as well. This is a three paragraph section which is sometimes used, but is sometimes not used. I have a sense that it sometimes confuses a jury more than it instructs them in the law.

MR. KLINGEMAN: That will be fine with me.

MR. REILLY: That's fine, Judge. Motive isn't an issue and I think intent is what we're going to be talking about all day.

THE COURT: Okay. Good suggestion, thank you. Actually, I only put it in because you included it in your extensive options, Mr. Klingeman.

MR. KLINGEMAN: Right. On page –

THE COURT: Alibi is out.

[75] MR. KLINGEMAN: Right. But just at the beginning of that page, the first sentence, the first full sentence reads: "The focus is on the conduct of the accused and not on the reaction of the tellers".

MR. REILLY: What page are we on?

MR. KLINGEMAN: This is page 16, top. That paragraph was added at the behest of the defendant, and in general I didn't object to it, and I don't object to it. But I do object to the language at the end of that first sentence – and not on the reaction of the tellers. The law is clear that the reaction of the tellers is relevant. To the extent that the reaction of the tellers is established by evidence in the case, an unreasonable reaction or a reaction of a particularly timid person, the reaction of the tellers may be – it may not advance the government's case, and I don't know – the government argues it does. And that legal explanation I just gave is given in the previous, or at the top of that paragraph that includes this sentence. And I don't want the jury to get the misimpression that they're to disregard the tellers' testimony.

I know counsel has made a number of objections to that testimony, but Your Honor has not sustained those objections, in view of the plain relevance of the evidence. And therefore, I'd ask that that sentence simply read, the focus is on the conduct of the accused – period. I have no [76] problem with that. But I don't want there to be any misimpression that but the focus should not also be on the reaction of the tellers.

MR. REILLY: Your Honor, that sentence was taken from case law and it originally read, "the focus is on the conduct of the accused and not on the reaction of

the victims". I simply included the word tellers because those were the people that witnessed the event. And in fact, they are not necessarily the victims of the robbery in the sense that the bank was the victim of the robbery.

But I think the case law is clear that the focus is on the conduct of the defendant. And I am at the opposite spectrum, of course, from Mr. Klingeman in that I don't want them to think that because the tellers are scared, that's intimidation. In fact, the case law is that simply having a scared teller is inconclusive as to whether intimidation occurred. So I think that the language should remain as it is.

MR. KLINGEMAN: Well, Your Honor, I propose as an alternative a brief sentence in between that sentence beginning, the focus is on, and the next sentence, the conduct must be reasonably calculated, that says that the reaction of the tellers, however, is relevant – period.

THE COURT: I think that there is a potential for confusing the jury leaving the sentence the way it is. It does not confuse a Court of Law, but it could confuse a jury. They [77] could say to themselves, well we've heard all of this about the tellers. If the reaction of the tellers is not the focus, then why did we hear it. So I think that Mr. Klingeman's suggest is a good one and it does preserve the defendant's opportunity to argue to the jury that the test is the objective reasonable person test. So –

MR. REILLY: Well, Your Honor, rather than – I'm not sure what your remedy is going to be. Perhaps I should hear that first. But I would suggest if you're going

to change that, then do as Mr. Klingeman said initially, simply put a period after the word accused.

THE COURT: Okay. So you would rather – given these two unattractive alternatives, you'd rather just cut the sentence at the word accused and not add the additional sentence Mr. Klingeman proposes.

MR. REILLY: Yes, Your Honor. Yes.

THE COURT: Okay. I'm going to do that then. And you still have preserved, Mr. Reilly, your suggestion that this, that these additional six words – eight words be in there, but I'm deleting them. But what I shall do is make sure that it does not appear as a new paragraph. In other words, it will be the paragraph beginning it is not necessary, on the prior page, contain and string along to these last two sentences with those eight words deleted.

MR. REILLY: Thank you.

[78] THE COURT: Uh-huh, thank you. And shall we continue, Mr. Klingeman?

MR. KLINGEMAN: Yeah.

THE COURT: Oh, while we're there, we're in the section of by force and violence or by intimidation defined, beginning at page 15. I think the appropriate place to put defendant's theory of the case language is right in there.

MR. REILLY: I think you're right, Judge.

THE COURT: So it would be without a heading, but it would come immediately after we say, the conduct must be reasonably calculated to produce fear of bodily harm. Okay? Your response has to be oral.

MR. REILLY: Oh, yes, Your Honor. That's fine.

MR. KLINGEMAN: Yes.

THE COURT: Thank you. Mr. Klingeman, you have the floor.

MR. KLINGEMAN: Your Honor, continuing on page 16, as you indicated a few moments ago, alibi should come out, and evidence of flight or concealment is applicable.

And finally, on page 18, Your Honor included an aiding and abetting instruction and –

THE COURT: I threw that in just to remind us to discuss it.

MR. KLINGEMAN: Yeah. It's our position that the defendant was the principal here and not the aider and abettor. [79] My only concern in terms of this instruction is the possibility for confusion.

THE COURT: I will not give it unless you plan to argue it.

MR. KLINGEMAN: I don't plan to argue it.

THE COURT: Well we'll take it out. Since it's in the indictment, you have to have the option.

MR. KLINGEMAN: Right. That's all I have, thank you.

MR. REILLY: I have nothing further, Your Honor.

THE COURT: Fine. Well we will revise this accordingly and provide you with a draft on the table

which you can pick up. I do suggest that you look it over, but I will have these changes made.

MR. KLINGEMAN: Your Honor, just by way of information, is it your practice to charge before or after summations?

THE COURT: I've done it both ways. Customarily, I charge them last.

MR. KLINGEMAN: Would you entertain an application to do it in reverse order today?

THE COURT: Mr. Reilly?

MR. REILLY: Your Honor, I would prefer that the charge be thelast thing that the jury hears before going into the jury room to deliberate. I think that's the appropriate procedure.

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Jury Charge

[117] your own selves, was he joking? "Don't follow me. I'm a fast runner." Or was he saying don't follow me or else? The answer to that question dictates the only verdict that you can render.

THE COURT: All right. Members of the jury, we have been here for an hour an a quarter. The jury charge itself will be read to you.It takes maybe 15 minutes. Unless anybody wants a recess, I would propose to provide that to you now and then you can begin your deliberations. Anyone that wants a recess, raise your hand. Okay, we will take a recess. It's very important that you be silent during this recess for obvious reasons. Ten minutes and then we'll resume.

(Jury exits Courtroom)

(Court in Recess – Court in Session)

THE CLERK: All rise.

(Jury enters Courtroom)

THE COURT: This is already written up on paper because the lawyers had an opportunity to have input as we prepared the legal instructions and then you have the opportunity to take it with you to the jury room to refer to it if you need to. That way you won't have to be scribbling any notes on the legal concepts as you're listening to them. It is also required to be presented to

you orally in Court. So if you'll just sit back a listen, please.

Members of the jury, this criminal case during which [118] you have seen and heard all of the evidence and heard the closing arguments of counsel now approaches its final phase when you will be called upon to enter on your deliberations and render a verdict in the case. Before you retire however, it is my duty to instruct you on certain principles of law which you must follow in performing your obligations as jurors.

Before doing so, the Court wishes to express its sincere appreciation to you for the services that you are rendering as jurors in performing your most – one of your most important duties as citizens.

Now as you know, the Government has accused the defendant, Floyd J. Carter, of committing a certain crime. But this is only a charge. In order for you to find the defendant guilty, you must be convinced beyond a reasonable doubt that the defendant committed a crime as charged. If you are not convinced beyond a reasonable doubt that the defendant committed the crime as charged, you must find the defendant not guilty of the crime.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court, and you'll apply that law to the facts as you find them from the evidence before you. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon a view of the law other than that given in the [119] instructions of the Court.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You should construe each of the instructions in light of and in harmony with the other instructions. And you should apply the instructions as a whole to the evidence. The order in which these instructions are given has no significance and is no indication of their relative importance.

As the jury in this case, as you know, you are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. And you draw whatever reasonable inferences you decide to draw from the evidence as you – from the facts as you have determined them.

I will discuss with you in a moment how to evaluate the credibility or believability of the witnesses. Now your deliberations, as you know, should be based only upon the evidence. Evidence consists of the testimony of witnesses, exhibits received into evidence, and any facts stipulated during the trial. I don't believe we have any facts stipulated.

MR. KLINGEMAN: No, Your Honor.

MR. REILLY: No, Your Honor.

THE COURT: You, of course, may make deductions and [120] reach conclusions which reason and common sense lead you to make. In other words, you are committed to draw from facts that you find have been proven such reasonable inferences as seem justified in light of your experience. An inference may be defined as a deduction or a conclusion which reason and common

sense lead you to draw from facts which have been established by the evidence. Such as, for example, I mentioned the example before, deducing that it's snowing outside when you see evidence of that directly when you're in the building.

Evidence does include both direct and circumstantial evidence. An example of direct evidence is the testimony of a person who asserts actual knowledge of a fact such as an eyewitness. Circumstantial evidence is proof when a chain of facts and circumstances tend to prove or disprove a conclusion. However, the law does not distinguish between the relative worth of direct and circumstantial evidence. One type is not of more or of less value than the other. And that's the law.

Statements and arguments of counsel are not evidence in the case. Questions asked by the lawyers are not evidence, for the evidence consists of the witnesses answers to the questions, not the questions themselves. When, however, the attorneys – again, I mention stipulations here but there just haven't been any in this case. You needn't concern yourself with that.

Any question as to which an objection was sustained [121] by the Court, that is a question that I ruled out, and any evidence which was ordered stricken by the Court – I believe I ordered you to disregard a portion of a sentence – must be entirely disregarded. You should not consider the Court's ruling on evidence as indicating anything about the strength or correctness of the position of either side in the trial as a whole. Anything you may have seen or heard outside the Courtroom is not evidence. However, you do have a right to consider all of the evidence in light of your own general knowledge in the affairs of life.

There has been testimony at trial that one or both of the attorneys or their agents interviewed witnesses to prepare for trial. No adverse or negative inference should be drawn from that conduct. Indeed, the attorneys were obligated to prepare this case as thoroughly as possible and that may generally include interviewing witnesses who the attorneys intend to call or who may testify at trial.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to what – as to the facts or as to what your verdict should be. The legal rulings that I have made during the trial are not any indication of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt.

You may not draw any inference – I mentioned this in [122] the opening statement – you may not draw any inference favorable or unfavorable towards the United States or the defendant on trial from the fact that any persons were not named as defendants in the indictment before you. The circumstances that any other persons were not indicted or were not on trial here must play no part in your deliberations. It should be of no concern to you, and you should not speculate as to the reason for their absence. Their absence should not influence your verdict with respect to the defendant on trial at this time. You must base your verdict as to the defendant solely on the evidence against him.

You will need to rely on your memory to recall witness' testimony. You will not be given transcripts of the testimony. However, if you truly cannot recall certain

testimony necessary for you decision, you may ask to hear that testimony again. Of course, documentary exhibits and other things in evidence will be available the you in the jury room.

As you know, you were permitted to take notes in this case, and some of you did so. Such notes should only be used as aids to your memory. And if your memory should later differ from your notes, of course, it is your memory which should control.

If you did not take notes, you should rely upon your own independent recollection and memory of what the testimony was and you should not be unduly influenced by the notes of [123] other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony was.

Now this case will be submitted to you for your verdict in the form of a written verdict sheet. It is necessary that you understand certain legal terms and rules which play a large part in the determination of this case. So you will now be given some definitions and explanations.

Before commencing your deliberations, you are reminded that under the law a person is presumed innocent of the crime charged. As I stated earlier the defendant in this case has been charged by indictment with the commission of a certain violation of law. The fact that he has been indicted is no inference of guilt. An indictment is simply a formal method of accusing a person of a crime. It is not and cannot be considered as evidence in any degree or in any way against the defendant.

Under our law, a defendant is presumed innocent. Thus, a defendant, although accused, begins a trial with a clean slate and nothing but the evidence presented before the jury may be considered as more than a charge against the accused. I instruct you that the presumption of innocence alone is sufficient to acquit the defendant, unless you the jury are satisfied beyond a reasonable doubt of the guilt of the defendant after careful and impartial consideration of all [124] of the evidence in the case.

The defendant has pleaded not guilty to the charge contained in the indictment. His plea of not guilty puts in issue each of the essential elements of the offense described in these instructions and it imposes upon the Government the burden of establishing each of those elements by proof beyond a reasonable doubt.

The burden of proving each and every essential element of the offense is at all times upon the Government.

This burden never shifts. It remains upon the Government throughout the trial and even as you deliberate. Thus, unless the Government has proven beyond a reasonable doubt each of the elements of a crime against the defendant as charged, the defendant must be acquitted of that crime.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. And reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proven by convincing character that a reasonable person would not hesitate to rely upon it in the most important of their own affairs.

A reasonable doubt may rise not only from the evidence before you, but from a lack of evidence. Reasonable doubt is one that appeals to your reason or your judgment, you [125] common sense and your experience. Reasonable doubt is not a vague, hypothetical or imagined doubt. The principle should not be used as an excuse for avoiding the performance of an unpleasant duty.

Please remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. It is not necessary for the Government to prove the guilt of the defendant to a mathematical certainty or beyond all doubt. In this world of ours it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to mathematical computation.

If you, the jury, after a careful and impartial consideration of all of the evidence in the case have a reasonable doubt that the defendant is guilty of the charge, you must find the defendant not guilty. If, however, you are convinced that the defendant has been proven guilty beyond a reasonable doubt, you should find the defendant guilty.

As previously stated, the defendant is presumed to be innocent and the burden on proving each and every essential element of the criminal offense charged is at all times upon the Government.

A defendant has no burden to prove that the defendant is not guilty or to present any evidence or to testify. The [126] defendant is not even obligated to cross examine witnesses for the Government.

You are here to determine whether the Government has proven the guilt of the defendant for the charge in the indictment beyond a reasonable doubt. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons.

Now on the subject of credibility of witnesses. You a as jurors are the sole and exclusive judges of the credibility of the witnesses called to testify in this case, and only you determine the importance or the weight that their testimony deserves. After making your assessment concerning credibility of a witness, you may decide to believe all of it, all of that witness' testimony, only a portion of it, or none of it.

In making your assessment you should carefully consider, carefully scrutinize all of the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to show whether a witness, in your opinion, is worthy of belief. Consider each witness' intelligence, motive to falsify, state of mind and appearance and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he or she has testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider, also, any relation the witness may bear to either [127] side of the case, the manner in which each witness might be effected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses

may or may not cause your to disagree or miscredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it different. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail, and consider whether the discrepancy results from innocent error or intentional falsehood.

The testimony of a law enforcement officer is entitled to no special or exclusive credibility. An officer who takes the witness stand subjects their testimony to the same examination and the same test of credibility that any other witness does.

The testimony of a witness may be discredited or impeached by evidence showing that the witness has been convicted of a felony, a crime for which a person may receive a prison sentence of more than one year. Prior conviction of a crime that is a felony is one of the circumstances which you may consider in determining the credibility of that witness.

[128] It is the sole and exclusive right of the jury to determine weight to be given to any prior conviction as impeachment and the weight to be given to the testimony of any one who has previously been convicted of a felony.

During the trial, Defendant Floyd J. Carter did testify. A defendant who wishes to testify is a competent witness and his testimony should not be disbelieved merely because he is a defendant. However, in weighing his testimony the jury should consider the fact that defendant has a vital interest in the outcome of his trial, an

interest that is possessed by no other witness, and is therefore, a matter that may seriously affect the weight and credibility to be given his testimony and one that you should seriously consider.

Now you will have a copy of the indictment in the jury room as you deliberate. But I again instruct you that the indictment is not part of the evidence in this case. The indictment is an accusation and you may not draw any inference of guilt on an accusation. Indictment is merely the formal way in which the United States brings this case to trial. Also, the fact that this prosecution is brought in the name of the United States of America entitles the Government to no greater consideration than that afforded to any other party to any litigation. All parties, whether the Government or individuals, stands as equals in the Court of Justice.

I have previously read you the indictment and you [129] will have it with you in the jury room. So I will not repeat the reading of the indictment now. But I will discuss the indictment.

Title 18 *United States Code,* Section 2113 (a) which is the offense charged in the indictment that I read to you earlier, provides in pertinent part:

> "Whoever by force and violence or by intimidation takes or attempts to take from the person or presence of another any money belonging to or in the care, custody, control, management or possession of any I federally insured bank shall be guilty of a crime against the United States."

You will see that there are some graphics in reading this quote. The words federally insured and the last few

to establish that the defendant knew that he was breaking any particular law. Ignorance of the law is no excuse and is not a defense in this case.

Knowledge may be proven by a defendant's conduct and by all the facts and circumstances surrounding the case. Knowledge and intent exist in the mind. Since it is not possible to look into a person's mind to see what went on, the [131] only way you have to arrive at a decision on these questions is for you to consider all of the facts and circumstances shown by the evidence and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is not necessary. Knowledge and intent may be inferred from all of the surrounding circumstances. You may consider the defendant's words or actions as well as other facts and circumstances in evidence and the reasonable inferences from that evidence to determine the defendant's state of mind and intent.

Now the phrase by force and violence or by intimidation used in the statue means either first, the use of actual physical strength or actual physical violence; or second, doing some act or making some statement to put someone in fear of bodily harm.

The intimidation must be caused by an act knowingly and deliberately done or a statement knowingly and deliberately made by the particular defendant and that it was done in such a manner or under such circumstances that would produce such a reaction or such fear of bodily harm in a reasonable person.

custody, control, management or possession of that money.

The intentional flight or concealment of a defendant [133] immediately after the commission of a crime or after he is accused of a crime that has been committed is not, of course, sufficient in itself to establish his guilt. It is, however, a fact which if proven you may consider in light of all the evidence, other evidence in the case when determining the guilt or innocence.

If proved, the flight of a defendant after he knows he is to be accused of a crime, may tend to prove that the defendant believed he was guilty. However, flight may not always reflect guilt or guilty. Similarly, feelings of guilt which are sometimes present in innocent people do not necessarily reflect actual guilt.

You are specifically cautioned that you may not use evidence of flight of the defendant as a substitute for proof of guilt. But you may consider it along with all the other evidence presented. Keep in mind, flight does not mean a presumption of guilt. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance attached to such evidence, that is exclusively within the province of the jury.

Here are just a couple of points. You will note that the indictment when you read it charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond [134] a reasonable doubt that the offense is committed on a date reasonably near the date alleged.

explained, drawing the inferences which you find warranted, and finding the facts to which you apply the law as I have given it to you in these instructions.

Consideration of the type or extent or any penalties that may or may not be imposed on the defendant has no place in that process. You are not to be swayed or influenced or concerned in way by the question of any punishment that might be imposed.

Now you have been sworn and chosen as jurors in this case to try the issues of the fact presented by the allegation in the indictment and a denial made by the not guilty plea of the defendant. Both the defendant and the Government have the right to expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

Any verdict you reach in the jury room, whether guilty or not guilty must be unanimous. In other words, to [136] return a verdict you must all agree. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because others may think differently or merely to get the case over.

After you have reached a verdict, you are not required to talk to anyone about the case unless the Court would order otherwise.

At this time, I instruct the Courtroom Deputy to call forward the Deputy Marshal who will guard and keep the jury in a safe place and not allow anyone to speak with them or nor to allow anyone to speak for them except their foreperson while the deliberations are in progress.

DEPUTY MARSHAL, SWORN

[138] THE COURT: Does either party wish to address the Court at side before the jury is sent to deliberate?

MR. KLINGEMAN: No, Your Honor.

MR. REILLY: No, Your Honor.

THE COURT: Ladies and gentlemen, if you will recess into the jury room, all of these materials will be supplied to you. Please follow the instructions and keep your deliberations together in the jury room as you deliberate. If you need to recess, you're free to move about the building just so long as all of your deliberations take place in the jury room. We do not need to know who you have chosen to be your foreperson unless, of course, you send out a note which will have to be signed by that person.

And now, as the deliberations begin, we will excuse our alternate who will not go into the jury room except to retrieve any personal possessions.

THE CLERK: All rise.

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA	Case Number 3:97-CR-520 (NJ) 3:98-CR-475 (PA)

v.

FLOYD J. CARTER a/k/a "Daniel O'Reilly"

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Oct. 28, 1998)

The defendant, FLOYD J. CARTER a/k/a "Daniel O'Reilly", was represented by Brian Reilly, AFPD.

The defendant was found guilty on count(s) 1 of indictment by a jury verdict on 01/23/98 after a plea of not guilty in Cr. 97-520 (NJ); the defendant pled guilty to counts 1-3 of indictment on 8/28/98 in Cr. 98-4754 [sic] (PA). Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:2113(a)	Bank robbery	9/9/97	1 (CR. 97-520)
18:2113(b)	Bank larceny	8/27/97	1-3 (Cr. 98-475)

As pronounced on 10/15/98, the defendant is sentenced as provided in pages 2 through 6 of this Judgment.

98-475 (PA) with each count running concurrently with each other, with credit for all time in custody.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

The defendant shall submit to one drug test within 15 days of commencement of supervised

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	32
Criminal History Category:	VI
Imprisonment Range:	210 months to 240 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ to $ 17,500
Restitution:	$ 11,993

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Career offense finding.

I HEREBY CERTIFY that the above and
foregoing is a true and correct copy
of the original on file in my office.
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
WILLIAM T. WALSH, CLERK
By /s/ Illegible
Deputy Clerk

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400, $100 each on count(s) 1 of indictment in Cr. 97-520, and counts 1-3 of indictment in Cr. 98-475, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 4th day of December, 1998.

/s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

Defendant's SSN: 136-48-0876
Defendant's Date of Birth: 04/27/55
Defendant's mailing address: Monmouth County Correctional Center; 1 Waterworks Road; Freehold, NJ 07728
Defendant's residence address: 29 Conger Avenue; New Brunswick, NJ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 215 months on Count 1 of Cr. 97-520 (NJ) and a concurrent term of 24 months on Counts 1-3 of Cr. 98-475

release and at least two tests thereafter as determined by the probation officer.

If orderd to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

The defendant shall refrain from the excessive use of alcohol and shall submit to testing to ensure compliance. It is further ordered that the defendant submit to evaluation and treatment if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall submit to drug treatment, on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

Restitution in the total amount of $11,993.00 to be divided proportionately to reflect half of the amount of loss sustained by the Sovereign Bank, 1102 Taylorsville Rd., Washington Crossing, NJ and First Federal Savings and Loan Association, 272 W. Bridge St., New Hope, PA

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5491

UNITED STATES OF AMERICA,

v.

FLOYD J. CARTER,

Appellant

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cr-00520-1
District Judge: Honorable Mary L. Cooper

Submitted Under Third Circuit LAR 34.1 (a)
May 19, 1999

Before: BECKER, *Chief Judge*,
RENDELL and ROSENN, *Circuit Judges*.

(Filed _____)

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a).

After consideration of all contentions raised by the appellant, it is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: June 16, 1999

UNREPORTED – NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5491

UNITED STATES OF AMERICA,

v.

FLOYD J. CARTER,

Appellant

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cr-00520-1
District Judge: Honorable Mary L. Cooper

Submitted Under Third Circuit LAR 34.1(a)
May 19, 1999

Before: BECKER, *Chief Judge*, RENDELL and ROSENN, *Circuit Judges*.

(Filed June 16, 1999)

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MEMORANDUM OPINION

ROSENN, Circuit Judge.

Appellant Floyd J. Carter and Terry Stillwell were charged in a one-count indictment with bank robbery in violation of 18 U.S.C. § 2113(a) in the United States District Court for the District of New Jersey. Stillwell pleaded guilty and, on January 23, 1998, a jury found Carter guilty of bank robbery. On October 15, 1998, the district court sentenced the defendant, Carter, to 215 months in prison.[1] Defendant appealed. We affirm.

I.

At approximately 2:00 p.m. on September 9, 1997, the defendant entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, wearing several layers of clothing and a ski mask that covered his entire face except for his eyes and mouth. As he entered, a customer, Maria Zahn, was leaving. Ms. Zahn attempted to exit around him, but the defendant pushed her back inside.

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[1] The district court had subject matter jurisdiction under 18 U.S.C. § 3231 and this court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(1) and (2).

Ms. Zahn was so terrified that she screamed, startling others within the bank.

At that point, Carter ran toward the customer service counter, and with a single leap, vaulted over the counter and through one of the teller windows to the area behind the counter where tellers Anastasia Hairston, Christine Sentech, and Mildred Calacal were standing. Ms. Hairston ran to the office of the branch manager, Robert Phipps, yelling that a robber was after her. Meanwhile, the defendant opened Ms. Hairston's teller drawer and emptied money into a brown paper bag. He then quickly moved to within two feet of where Ms. Sentech and Ms. Calacal stood and proceeded to empty their teller drawers. Meanwhile, Ms. Zahn ran out of the bank, got into her car, laid down on the floor and prayed until the authorities arrived.

After having removed almost $16,000 in currency from the teller drawers, the defendant hurdled back over the teller counter and warned that no one was to follow him. He ran to a getaway car operated by Terry Stillwell, climbed into the trunk, and closed the hatch. The car then sped off. A short while later, the police arrived. At that point, a description of the getaway car was broadcasted over police radio. Eventually, other officers stopped the getaway car and apprehended Carter and his disguise. The defendant subsequently waived his *Miranda* rights and confessed to FBI special agent James Maxwell that he and Stillwell had driven to Hamilton Township from New Brunswick to rob the bank.

II.

The defendant's primary issue on appeal is the district court's decision to reject his request to instruct the jury on bank larceny. The district court's decision to reject his request is subject to plenary review. *See United States v. Price*, 13 F.3d 711, 724 (3d Cir. 1994).

A.

The defendant argues that, even though not charged in the indictment, bank larceny is "a lesser included offense" of bank robbery for purposes of Fed. R. Crim. P. 31(c). He therefore contends that the jury should have been instructed on bank larceny because the theory of his defense at trial was that he took money from the bank without force, violence, or intimidation.

The district court denied the defendant's request on the ground that this court in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), issued shortly before Carter's trial, held that bank larceny is not a lesser included offense of bank robbery. In *Mosley* this court remarked that under Section 2113(a) "the subjective intent of a bank robber to steal is irrelevant; 'the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes.' " *Mosley*, 126 F.3d at 204 (quoting *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976)). Conversely, the *Mosley* court observed that under Section 2113(b), the perpetrator must have the "intent to steal or purloin to satisfy the elements of bank larceny." *Mosley*, 126 F.3d at 204.

The defendant asserts that even under *Mosley* the district court still was obligated to instruct the jury on the defense's theory that he committed bank larceny, not bank robbery. We disagree. *Mosley* rested solely on the legal interpretation of Sections 2113(a) and (b). *See* 126 F.3d at 204. We conclude that the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in *Mosley* appropriately rested solely on a legal interpretation of Sections 2113(a) and (b). *See* 126 F.3d at 204.

Notwithstanding the holding in *Mosley*, the defendant contends that we should reconsider that decision. He argues that an examination of the language of the statute reveals that Congress employed the dictionary definition of the words "steal" and "purloin," contained in the bank larceny provision, when it wrote the bank robbery provision. He notes that the word "purloin" is a synonym of "steal" and that the text of the statute with respect to these terms alternatively defines the same element. He also claims that absent a clear and specific statement by Congress that a particular criminal statute does not require a *mens rea*, this element of intent is presumed to exist. Consequently, he submits that omission of the *mens rea* requirement in the text of the bank robbery statute raises a presumption that *mens rea* is a requisite element of bank robbery. Thus, he submits that the intent to steal is an element of both bank larceny and bank robbery. Finally, he contends that the *Mosley* decision was based on a mistaken and incomplete consideration of the common law history of bank robbery and bank larceny, and an incorrect application of the relevant case law. We disagree with the defendant in all respects

because Congress created a statutory crime of robbery that is set forth fully in Sections 2113(a) and (b).

First, in *Brown*, this court held that specific intent is not an essential element of a violation of Section 2113(a). Second, under the modern robbery statute, Congress did not use the language of the common law to define the offenses of bank robbery and bank larceny. *See Bell v. United States*, 462 U.S. at 360 (citing *Turley*, 352 U.S. at 411-412). Finally, Section 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property. Accordingly, we conclude that our decision in *Mosley* need not be disturbed.

B.

The defendant also contends that the district court misinterpreted and misapplied United States Sentencing Guideline Section 3E1.1 in denying him a reduction in the offense level because he accepted responsibility for the offense. He submits that he accepted responsibility for his criminal conduct for purposes of Section 3E1.1 because he conceded at trial that he committed bank larceny, but denied that his conduct amounted to the offense of bank robbery because he did not use force, violence, or intimidation.

The district court's decision to deny the claim for acceptance of responsibility is reviewed for clear error. *See United States v. Muhammad*, 146 F.3d 161, 167 (3d Cir. 1998). The reduction for acceptance of responsibility generally does not apply to a defendant "who puts the government to its burden of proof at trial by denying the

essential factual elements of guilt, is convicted and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, Application Note 2. At trial, Carter challenged the testimony of Ms. Zahn, claiming that his physical contact with her was wholly accidental, and that she did not scream. He attacked the Government's evidence as to his threatening remark as he fled from the bank. Finally, in his summation, he argued that there was no implicit threat of violence or injury to discourage a pursuit. These challenges to the Government's case are inconsistent with an acceptance of responsibility.

Accordingly, we conclude that the district court committed no error in rejecting defendant's request for a reduction in his offense level. *See United States v. DeLeon Rodriguez*, 70 F.3d 764, 767 (3d Cir. 1995) (district court properly denied acceptance reduction after appellant pleaded not guilty and contested his factual guilt beyond a mere legal challenge); *United State v. Veksler*, 62 F.3d 544, 551 (3d Cir. 1995).

C.

Lastly, the defendant contends that the district court erroneously denied his motion for acquittal pursuant to Fed. R. Crim. P. 29 because the Government failed to establish that he used force, violation, or intimidation to perpetrate the predicate offense. When a jury returns a verdict, this court's review is plenary and, in employing that review, we must view the evidence in the light most favorable to the Government to determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Burks v. United States*, 437 U.S. 1, 17 (1978); *United States v. Leon*, 739 F.2d 885, 890 (3d Cir. 1984).

To obtain a conviction for unarmed bank robbery under Section 2113(a), the Government must prove that the defendant: (1) used force and violence or intimidation; (2) took or attempted to take from the person or presence of another, (3) money, (4) in the care, custody, or control of a federally insured bank. To establish "intimidation" under Section 2113(a), the Government need show only that "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *Untied* [sic] *States v. Woodrup*, 86 F.3d 359, 363 (4th Cir. 1996). The evidence shows that the defendant wore a ski mask that covered his entire face except for his eyes and mouth, and that he gained access to the teller cages by forcefully, speedily, and impermissibly vaulting the customer service counter. These abnormal activities plainly were acts of intimidation, as well as his exertion of force on Ms. Zahn. We see no error in the district court's denial of the defendant's motion for acquittal.

III.

For the foregoing reasons, the judgment of conviction and sentence of the court will be affirmed.

/s/ Max Rosenn
Circuit Judge

Supreme Court of the United States

No. 99-5716

Floyd J. Carter,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 13, 1999